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IN THE
**Supreme Court of the United States**
**October Term, 1986**

DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

*Petitioner,*

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO,

*Respondents.*

# PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

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## STATEMENT

Because respondent's opposition papers—a brief for the Employer respondent ("Skalet"), a letter from Local 1-J's counsel ("Union") of July 16, 1987—are so diffuse and generalized, we deem it necessary to maintain a context of reference in this reply brief with a short outline of the sequence of pertinent events and of what we feel to be the governing law in this case.

### The Case for Which Review is Sought

*Events*

On March 12, 1984 the Union instituted an arbitration proceeding against Skalet on behalf of its shop steward ("Grynberg") seeking a make whole remedy of

back pay and incidental benefits because of Skalet's breach of the collective agreement in laying Grynberg off out of the contractually prescribed order of layoff in the inverse order of departmental seniority (Petition, pages 11, 12;* Joint Appendix, page 22a).** In pre-hearing discussion Union counsel told Grynberg that if he attempted to testify about the employer breach and its circumstances, counsel would terminate the Union's representation of Grynberg and, further, that the Union had no intention of calling corroborating witnesses (Pet. 14a). To Grynberg's written protest of August 3, 1984 and his demand that the Union not abandon him (Pet. 14a, 15a), the Union moved to be "removed" as Grynberg's representative on the ground of Grynberg's lack of "trust and faith" in it (Pet. 17a). Notwithstanding the Union's rhetorical ploy that if the arbitrator denied its motion, the Union was still prepared to go forward in the representation of Grynberg, and with Grynberg's letter of August 3, 1984 before him, the arbitrator nevertheless "removed" the Union and its counsel as Grynberg's representative and directed him to obtain other legal representation (Pet. 18a). Grynberg's new counsel, again before any evidentiary hearing, wrote to the arbitrator protesting the illegality of withdrawing Union representation both as a violation of Grynberg's entitlement to it and as a Union punishment for daring to express his desire to have witnesses, himself included, testify in his behalf. Grynberg's counsel also demanded that, in the light of what had happened, the arbitrator ought to step down so that the federal district court could appoint an impartial successor arbtrator (J.A. 33a). The arbitrator would not relinquish his position.

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*References are to pages of the petition for certiorari herein; hereafter "Pet.__."

**References are to pages of the Joint Appendix for the Court of Appeals, a copy of which, for the convenience of this Court, was submitted with the petition herein; hereafter "J.A.__").

Bearing in mind that suppression of evidence—Grynberg's expressed desire for witness testimony to establish his case—was plainly the Union's purpose in its gambit to have the arbitrator* "remove" Grynberg's union representation, it is ironic that he succeeded in obtaining the affidavit and corroborating oral testimony of a gemstone setter no longer in Skalet's employ (Pet. 20a-22a) who testified that Grynberg's departmental junior, who was *always* retained while shop steward Grynberg was on layoff, was mainly engaged in performing the journeyman work of the jewelry department and did most of his sideline work, such as machine maintenance, out of regular hours when the machines were not in operation. He also testified to great personal animus for his shop steward on the part of Skalet's principal. The arbitrator in his final award of November 9, 1985 (Pet. 23a-27a), denying Grynberg any relief, not only disregarded the testimony of Grynberg's witness, he made sure it would appear undisputed and uncontested that, in Grynberg's absences, his departmental junior performed union journeyman work for only one or two hours a day and spent the rest of his time sweeping the floor, repairing vacuum cleaners and plumbing, maintaining machines and running errands. In the arbitrator's award, Grynberg's witness had no existence.

More important, in explicitly overriding the plain, unambiguous and unconditional contractual provision that seniority in department govern the order of layoff and recall (Pet. 11, 12), the arbitrator was not only indulging

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*Suppression of evidence is a vacatable ground under the Federal Arbitration Act, 9 U.S.C. §10(c), and an arbitrator's participation is misconduct:

> "§10 *** the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> ***
>
> (c) Where the arbitrators were guilty of misconduct *** in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

an error of law in circumventing the parol evidence rule, he was committing the vacatable arbitral error of dispensing his own nostrum at the expense of the fidelity which he owed to the contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Because the Union professed to be unhappy with the award, Grynberg's counsel wrote to Union counsel requesting union cooperation and consent in the application which Grynberg was about to bring under 9 U.S.C. §10 to vacate the award and for a new arbitration (J.A. 52a, 53a), but Union counsel "reluctantly" declined to join in the application and delivered a closing stricture:

> "One further note, you are to advise Mr. Grynberg that under no circumstances is he to indicate in your application that he represents the Union for any reason or upon any basis, in law or equity." (J.A. 54a, 55a)

In the District Court proceeding to vacate the award and grant Grynberg a hearing *de novo* after vacatur, fully discussed in the petition, we feel there are three features of its opinion that would, for practical purposes, destroy judicial enforceability both of the §301(a) LMRA right to fair representation in grievance arbitration instituted by a union, whether or not augmented by the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.*, and the sequential right of the wronged grievant, as individual, to judicial suit against the employer for breach of contract. These are:

1) The absurd notion that unless a grievant can convincingly fake unbounded faith and confidence in his union representative, he forfeits his right to its fair representation services. Our criticism is not directed to an objective showing of obstructiveness, but it surely has no place where the threat and use of withdrawal of union representation is a coercive attempt to suppress evidence and a punishment for the exercise of statutorily protected free speech.

2) The distorting impression sought to be created that

the "actual breach" of the union duty of fair representation and the "erroneous outcome" of the arbitration itself are two separate and discrete requirements for vacatur (Pet. 12a) when, as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976), makes clear, the "erroneous outcome" requirement is no different than the reversibility which flows from the commission of some material procedural flaw in ordinary litigation. An adverse award flowing from a threshhold withdrawal of representation in the interest of suppressing evidence and punishing protected speech, as well as from a perverse misreading of explicit contract language, is surely an "erroneous outcome."

3) The shocking denial of standing to a grievant—a real party in interest if ever there was one—as a "party" to an arbitration, to maintain suit for vacatur under the Federal Arbitration Act, especially where the grievant was forced to conduct the proceeding in his own behalf.

All of this the Court of Appeals has affirmed, *sub nom. Local 1-J v. Skalet,* 814 F.2d 653 (2 Cir. 1987).

*The Law*

We feel that the governing law is comprehensively set forth in the passage we quoted from *DelCostello v. United Brotherhood of Teamsters,* 462 U.S. 151, 163-165 (1983) (Pet. 6,7). And we point out that, in the pursuit of his breach of contract claims against the employer, Grynberg has exhausted arbitration remedies, and that his Union's abrupt abandonment of him in clear violation of its statutory duty to give him fair representation has been swifter and more radical than the merely perfunctory representation which the courts condemn as legally inadequate. Given those circumstances, his clear option, notwithstanding his employer's wistful desire that he get lost in premature, arbitration destroying, and very unpromising litigation against the Union, is to continue, doggedly, in the prosecution of his contract claims against his

employer. To that end, his very necessary first step under §301(a) LMRA is to get the adverse arbitration award vacated. What follows success in such a litigating venture is not an employer forfeiture, but a right of Grynberg to litigate his contract claims in a court of law according to law, and, against that eventuality, his employer has no legitimate complaint.

## ARGUMENT

*a) Skalet's Opposition*

Peculiarly like Grynberg, Skalet places its chief reliance on *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), although *Hines* is the source of reserving private rights of contract recovery against employers for grievants wronged by their unions' violation of duty to afford them fair representation in the arbitration which is the required remedial mode of first resort.

Supporting its recruitment of *Hines* for Skalet's purposes, Skalet cites *Del Casal v. Eastern Airlines, Inc.*, 634 F. 2d 295 (5 Cir. 1981) and *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6 Cir. 1986), *cert. den.* 6/22/87, __ U.S. __ (Docket No. 86-1759) as authorities disculpating the employer notwithstanding the unions' respective violations of the duty to furnish fair representation. To that argument, urged as applicable to this case where the employer's breach of the contract is freely admitted but excused because the contract provision was "unjust," we can only say:

1. Both cases present complicated facts not even remotely resembling the more typical grievance arbitration here presented.

2. Neither case has been ruled upon for merits by this Court.

3. *Hines v. Anchor Motor Freight, Inc.* still requires a judicial inquiry into the pervasiveness and severity of procedural transgressions.

4. For purposes of certiorari, resolution of important issues by the Court, rather than a showing of the likelihood of ultimate victory by the petitioner is the guiding requisite.

We take sharp issue with Skalet's statement at page 4 of its brief:

> "Petitioner attempts to portray this case as one of monumental importance to millions of workers and of great precedential significance. In fact, the case is unique in its facts, and is of minor precedential significance if any, since it was not reported in an *official* reporter excerpt for a sub modo notation of affirmance by the Circuit Court, and correctly applies this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)." (emphasis supplied)

If the *unofficial* reporter of the district court opinion is the American Arbitration Association, then the arbitrating industry knows how greatly its powers have been enhanced to satisfy its financial supporters, *viz.*, unions and employers, at the expense of hapless grievants.

The case is important if, to practical effect, it renders unenforceable what Congress intended as a strong remedial right to fair representation as the *quid pro quo* for the exclusive contract enforcing powers granted to the union representatives. Under this case, a grievant must convince his union representative of his "trust and faith" in it, acquiesce in and not even press his own ideas against or as proposed alternative to whatever the union proposes—even to a point of suppressing evidence; if he is abandoned and forced to conduct his own case, and even if the arbitrator commits transgressions forbidden by the Federal Arbitration Act—exceeds his powers by depriving the grievant of his statutory right to representation by his union and connives to do so because he knows the Union wants to suppress the testimony of witnesses who would help its case, acknowledges a breach of contract but refuses to enforce its terms, the arbitrator will yet succeed

because the grievant, although forced to conduct the arbitration as his own is nevertheless *judicially* denied standing as a party to maintain the vacatur proceeding.

There are, of course, millions of such people and their families plus the millions more who love equal justice for all classes of our citizenry. And the holding below reduces the American worker to the status of a peon without ordinary rights of judicial recourse.

*b) The Union as both plaintiff and respondent*

By letter, as usual, the Union complains that the low portion of the caption has been altered so that the Union, although a plaintiff on the top half of the Court of Appeals caption is now a respondent at the bottom of the certiorari caption. But, of course, for certiorari purposes, a plaintiff may be made a respondent and a defendant may be a petitioner.

In its frantic correspondence with the Court of Appeals, the Union sought to destroy Grynberg's entire case by claiming a fatal omission to obtain personal service of district court process on the Union.

Actually originating service had been made on both Skalet and the Union by mail under the provisions of 9 U.S.C. §12 allowing service on local attorneys for the parties and with mail sanctioned for such service under FRCP Rule 5(b). It was therefore properly served with originating process, but it chose to stay aloof.

Having intruded itself back into the case, we feel that the Union is entitled to make its applications on proper papers rather than letters. It may be that its intrusive efforts have made it susceptible to remedial attention by the Court.

## CONCLUSION

For the foregoing reasons, as well as those expressed in our petition, petitioner earnestly prays for the grant of a writ of certiorari herein.

Dated: New York, New York
July 23, 1987

Respectfully submitted,

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